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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Amendment of Rules and)
Policies Governing Pole)
Attachments)

) CS Docket No. 97-98

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JUN 27 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

JOINT COMMENTS OF THE ELECTRIC UTILITIES COALITION

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EXECUTIVE SUMMARY

The Electric Utilities Coalition ("Electric Utilities") is a group of 18 investor-owned electric generation, transmission and distribution companies.

The Telecommunication Act of 1996 reflects Congress' express intent to move quickly toward a fully competitive telecommunications industry. To facilitate this transaction, Congress has required electric utility companies to provide access to their distribution systems to facilitate provision of telecommunications services by new market entrants. In this proceeding, the Electric Utilities urge the Federal Communications Commission ("Commission") to exercise its discretion to establish maximum, presumptively applicable prices for use of their facilities in a manner which ends past subsidies and which encourages movement toward forward-looking, competitive and market-based pricing. Prices set by the Commission's early regulations for cable companies' access to utility facilities were designed to spur the growth of the cable industry. Today that industry is fully mature, so there is no justification for continued cross subsidization of any portion of the cable industry by electric utility customers or stockholders.

The Electric Utilities recommend that poles be classified into two categories: 30-foot poles and 40-foot poles. The manner in which space is allocated is different for 30-foot poles than it is for 40-foot poles, and failure to make this correction to the pricing formula will result in cross-subsidization. The Electric Utilities also recommend that the Commission correct a serious flaw in its current regulations by allocating 100 percent of useable pole space in setting prices for access to distribution facilities. Currently, less than 100 percent of useable pole space is allocated, contrary to Congress' and the Commission's intent to use fully allocated costs. Finally, the Electric Utilities recommend that the Commission recognize that the 40 inches of safety clearance required by the National Electrical Safety

Code exists solely for the benefit of cable and communications service providers and therefore should be allocated as useable space to those entities. If not for the presence of cable companies and other attaching entities, there would be absolutely no necessity for electric utilities to incur the cost of this required safety zone. The cost of safety clearances required for electric conductors is already included in the useable space allocated to electric service. Each service should pay for the pole space required for its service.

Furthermore, there are a number of capital and operating and maintenance costs which are not included in the current formula. In these comments, the Electric Utilities make specific recommendations about additional accounts required by the Federal Energy Regulatory Commission ("FERC") that must be included and properly allocated in prices set by the Commission to avoid cross-subsidization of cable and telecommunications services.

Finally, the Electric Utilities urge the Commission to recognize that electric underground conduits and ducts are totally different from those used to provide telecommunications services, due primarily to the extremely high voltages and electrical currents in urban-area conduit systems. Further, accounting conventions do not permit any uniform or accurate formulaic approach to calculating the cost of urban conduit systems. In view of this, and consistent with the policy of moving toward market-based rates, the Electric Utilities urge the Commission to use replacement costs as the benchmark for presumptively maximum conduit rental rates. Suggestions are also made for estimating conduit operating and maintenance expenses from specific FERC accounts and for properly allocating them to attaching entities.

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TO: The Commission

JOINT COMMENTS OF THE ELECTRIC UTILITY COALITION

Carolina Power & Light Company ("CP&L"), Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company ("PG&E"), Potomac Electric Power Company ("PEPCO"), Public Service Company of Colorado ("PSCo"), Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company ("TECO"), and Virginia Power, including North Carolina Power, (each an "Electric Utility," collectively, "Electric Utilities"),¹ by their attorneys, hereby file their Joint Comments in response to the March 14, 1997, Notice of Proposed Rule Making ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in CS Docket No. 97-98.²

1. A full description of each of the members of the Electric Utilities Coalition is contained in Appendix A, attached hereto.

2. Although the NPRM specifies an initial comment date of May 12, 1997, these Comments are timely filed pursuant to *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Order, DA 97-894, released April 29, 1997 (extending comment date until June 27, 1997).

I. INTRODUCTION

These Joint Comments are submitted in support of the Commission's efforts to reformulate its pole attachment pricing rules and policies to reflect the move toward a fully competitive telecommunications market, consistent with the purpose of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). To achieve this goal, the Commission should embrace several over-arching policy objectives in formulating rules in this proceeding. The Commission should recognize that no properly functioning and competitively robust market will remain viable for very long if any part of it is supported by subsidies. The Commission must formulate and adopt rules that will bring prices for cable and telecommunications infrastructure as close to market prices as possible. In doing so, the Commission's rules must deliver appropriate pricing signals to the market to avoid creating false economic advantages for some telecommunications- or video-delivery service vis-a-vis all others. Finally, to the extent possible, the Commission should utilize forward-looking costs in determining the prices cable and telecommunications providers must pay for siting and constructing their facilities. Adherence to these policies is necessary to properly apply the principles and guidelines of the 1996 Act to pole attachment pricing.

The Electric Utilities also note that the statutory provisions which form the basis for this rule making are currently being challenged in the Federal District Court for the Northern District of Florida.³ The basis for the suit is, *inter alia*, that the mandatory access provisions in the 1996 Act result in an unconstitutional physical taking of property in

3. See *Gulf Power Co. v. FCC*, Civil Action No. 3:96 CV 381/LAC (N. Dist. Fla. 1996).

violation of the Fifth Amendment of the U.S. Constitution. While the Electric Utilities do not believe that these provisions of the 1996 Act are constitutional, they also recognize that the Commission does not have the jurisdiction to determine the constitutionality of its organic statute.⁴ The Electric Utilities are participating in this proceeding without waiving any arguments relevant to the Florida litigation and are permitted by law to pursue all available arguments in this proceeding without prejudicing their rights in any other proceeding. Moreover, regardless of the outcome of the Florida litigation, the rates adopted in this proceeding might be confiscatory and are themselves in violation of the Fifth Amendment.

II. BACKGROUND AND GENERAL POLICY GUIDELINES

A. Policy Objectives of the 1996 Act

Congress adopted the 1996 Act to realign the marketplace for communications services so that, despite its history and past statutes, rules and regulations, the industry could move toward a more fully competitive environment. First Report and Order at ¶ 1 ("In the new regulatory regime, we and the states remove outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by

4. The Commission has expressly recognized its jurisdictional limitations to determine constitutional issues in other contexts. *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket 96-152, Second Report and Order, 1997 WL 136310 ¶ 24 (1997); *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket 96-152, First Report and Order, 1997 WL 49613 ¶ 37 (1997); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16085-6 (1996) ("First Report and Order"); *Syracuse Peace Council v. Television Station WVTH*, 2 FCC Rcd 5043 at n.63 (1987).

Congress."). Congress clearly intended its amendments to the Communications Act generally, and to Section 224 specifically, to move prices for the siting of cable and communications facilities toward those which would be found in a fully competitive market. Congress took this step in full recognition of the significant changes that have taken place in the cable and communications industries in the almost twenty years since Congress and the Commission began regulating cable attachments. In adopting the 1996 Act, Congress demonstrated a preference for the well-established economic principles which determine the pricing of goods and services in competitive markets.

The 1996 Act broadens the regulation of pole attachment rates that apply to the use of electric utility facilities by cable and telecommunications companies. In particular, pole attachments for all communications providers (excluding incumbent local exchange carriers), in addition to cable television operators, are now subject to federal regulation.⁵ In creating a transition to broader and even application of the pole attachment regulations, Congress provided for a two-phase adjustment to pole attachment rate regulation.

In phase one, which constitutes this proceeding, the formula previously established for cable television operators will continue to apply to those operators as long as they provide only cable service and do not expand into provision of other communications services.⁶ The same formula will also apply to telecommunications carriers until the new regulations are fully implemented, which will take more than 10 years. The statutory costing methodology

5. As amended, the statute defines "pole attachments" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

6. 47 U.S.C. § 224(d).

limits rates to the cost of the proportionate amount of "usable" space occupied by a cable or telecommunications provider times the cost of the entire pole.⁷ The formula does not specifically address "unusable" space.

During the two year period following the enactment of the 1996 Act, the Commission is required to establish a new pricing regime applicable to all providers of non-LEC telecommunications services -- including cable providers who also provide communication services -- when parties cannot reach a voluntary agreement regarding pole attachment charges.⁸ Under the new rate formula, a utility must apportion the cost of unusable space on a pole, duct, conduit, or right-of-way such that the total apportionment recovers two-thirds of the costs of providing the unusable space from the telecommunications service providers who have attachments on a pole.⁹ The cost of usable space, by contrast, is to be allocated based on the percentage of usable space required by each attaching entity. The new rate is to be phased-in over five years.

Until the new rate becomes fully applicable to telecommunications providers, the cable rate, as modified in these proceedings, will apply to all telecommunication providers subject to Section 224. Taken together, Congress intended the changes to the pole attachment regime adopted in the 1996 Act to facilitate negotiation for the use of a pole owner's property to satisfy each attacher's competitive needs and priorities and to assure compensation which is just and reasonable rate in the event negotiation fails. Updating the

7. 47 U.S.C. § 224(d).

8. 47 U.S.C. § 224(e).

9. 47 U.S.C. § 224(e)(2).

cable attachment rate in this proceeding is a critical step toward achieving the fully competitive market (and market-based) rates implicit in the 1996 Act.

B. Electric Utility Operations and Congressional Intent

The primary focus of electric utility operations is the provision of safe, reliable and affordable electricity, an essential service for all members of the public. While utilities have historically entered into joint use and ownership agreements with local exchange carriers who owned poles, it was for the sole purpose of reducing costs to the benefit of ratepayers. These poles originally were installed to connect wire and fiber facilities to homes and businesses to distribute electric power and telephone service. Given the significant economies of scale realized by joint pole use, both industries found it in their mutual interest to reach agreement on a cost-sharing arrangement, and regulation of pole attachments rates was not required. Later, as an accommodation and not as a central part of their business, some electric utilities allowed cable companies to attach their lines to certain of the electric utilities' distribution poles.

In 1978, Congress promulgated Section 224 of the Communications Act, 47 U.S.C. § 224, for the first time authorizing the FCC to regulate rates charged to cable television providers for the use of poles owned by other utilities. As the legislative history indicates, one of the purposes of § 224 was to foster the deployment of cable television. Indeed, the original statute contemplated a pricing formula that would be phased out in five years and recognized that the "just and reasonable standard" adopted in the 1978 Act provided the Commission considerable flexibility in reviewing rates charged for use of utility poles. As the Senate Report noted:

Ultimately, CATV pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers to pay for costs which are passed along to them. Another important consideration is the relative importance of each of the respective services to the communities served.¹⁰

The original pole attachment provisions of the Act, as passed in 1978, were intended to promote the growth of cable expansion and the delivering of cable services to the marketplace. As Congress stated in adopting the 1996 amendments to the pole attachment provisions:

The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers. The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.¹¹

C. Changes in Cable Industry

The maturity of the cable industry and its migration toward becoming a telecommunications service industry demands a revision of the current regulations and pricing formulas originally adopted to foster growth. The interim pricing changes which Electric Utilities urge the FCC to adopt in this proceeding will facilitate the incremental removal of existing subsidies and encourage movement toward competitive pricing in the telecommunications industry consistent with the intent of Congress.

In 1978, there were 13.4 million basic cable customers, of which only 3.3 million subscribed to premium service, and the cable companies serving them were mostly small entities struggling to become established. Only 17.9 percent of the population had access to

10. S. Rep. No. 95-580, 95th Cong., 1st Sess. 18 (1977).

11. S. Rep. No. 104-23, at 91 (1996) *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

cable, and the two largest cable operators, American Television and Communications Corp. and Tele-Prompter, each served approximately one million customers. As a result of numerous factors, notable among them being the assistance received through the Pole Attachment Act and the FCC's regulations, the industry has prospered. It is now fully mature, and no longer requires the implicit subsidies and preferences written into regulations and pricing formulas. Sixty-four million households that receive cable services, forty-nine million, or 76%, which subscribe to premium services. Another 50 million homes have access to cable service but choose not to subscribe. All together, today, unlike in 1978, over 65% of all television households have access to cable. Moreover, virtually all television households have access to satellite service. In sum, the cable industry has matured significantly since 1978.

To no surprise then, cable television providers are no longer small, thinly capitalized entities in need of special assistance. Approximately one-third of the market is now served by two very large and very well financed corporate giants. Tele-Communications, Inc., serves approximately 14 million customers with an annual revenue of \$4.153 billion, and Time Warner Cable serves approximately 7 million customers with an annual revenue of \$1.7 billion. By contrast, many of the local electric utilities with whom these cable giants will be negotiating, even the large ones, are much smaller. Electric utilities such as Entergy Corporation, Georgia Power and CP&L, each serve approximately 4.8 million, 1.7 million and 1.1 million customers, respectively. Accordingly, given the relative parity in economic power between cable and electric companies, the FCC should today direct its policies toward assuring that there are no cross subsidies of cable enterprises, or other telecommunications

services, by electric utilities and no competitive advantage lent to such giants vis-a-vis other communications service providers.

Twenty years have passed since the promulgation of § 224. Congress has mandated that this is an appropriate time for the Commission to take a hard look at its pricing guidelines for access to electric utility facilities and to consider them afresh in light of current policy considerations. The cable television industry has now fully matured from the fledgling industry of 1978, and consumers have more options than ever before with more standard TV offerings, easy cable access, satellite dish, and rental movies using relatively inexpensive VCR's. Just as significantly, the electric utility industry is on the cusp of major changes which will severely limit its ability to provide subsidies to either the cable industry or the communications industry in the form of below-cost attachment rates. The Commission's rules and policies adopted in this proceeding should, like the amendments to the Communications Act adopted by Congress, reflect the above-described changes in the cable industry, the market conditions and alternatives available to attaching telecommunications entities, and the significant competitive risks and challenges now emerging in the electric utility industry.

D. Sound Economic Principles Compel Implementation of the Stated Policy Objectives of Moving Toward Market Pricing and True Competition

The Commission should design its pricing guidelines to implement the development of a competitive marketplace and to avoid cross-industry subsidies. To this end, the Commission should exercise its legitimate discretion in ways which will move prices for pole attachments in the direction of pricing which mimics the marketplace and which sends long-term price signals which avoid economic preference of one communications provider over

another. The Commission should not grant new market entrants pricing preferences and subsidies which distort competition or ignore the obstacles faced by other communications providers who do not rely on poles, such as satellite transponders and other wireless options. To avoid granting such economic preferences to cable providers and other market entrants, the Commission should clearly differentiate between access on the one hand, and shifting costs and risks to electric utility pole owners on the other.

The Electric Utilities therefore respectfully urge the Commission to establish guidelines which move toward prices based on the market value of the assets being utilized.¹²

To achieve prices that reflect market value, market forces should be relied upon to the maximum extent possible, to establish pole attachment rates. The Commission should

12. Alternative delivery platforms represent, in many markets, competition to the traditional hard-wired cable industry. To the extent that these new platforms represent competition, it is even more important that the pricing adopted by the Commission in this proceeding send proper market based pricing in order to assure a level playing field among all competitors. The most important example of this concept is the recent auction of wireless frequencies by the Commission. The FCC has sold, at auction and at free market rates, licenses for spectrum totalling just over \$23.1 billion. *See Auction Net Revenues* chart at Figure 1 attached hereto. Adopting pricing in this proceeding which would result in a non-market based subsidy to cable operators and pole attachers would create an unequal playing field for cabled and wireless communications providers. Such a result should be staunchly avoided.

Since the passage of the original pole attachments act new entrants to the basic POTS telecommunications industry have also emerged, fundamentally changing an industry that was once strictly a monopoly enterprise. New competitive communications carriers, including competitive local exchange carriers ("CLECs") and wireless communications providers, have now entered the arena as active competitors to traditional local exchange carriers. Competition among the players in this arena will be seriously skewed if the Commission does not adopt policies and pricing signals which comport to open market rates and forward-looking pricing. At the same time, this competition will police the pricing of access by establishing market values for services provided by electric utilities.

recognize that significant incentives exist for pole attachers to agree voluntarily on negotiated rates. Such reliance on voluntary market transactions is supported by the wording of the 1996 Act. At the same time, for instances in which parties fail to reach agreement, the Electric Utilities propose herein a formula for pricing pole attachments.

The Electric Utilities also urge the Commission to adopt rules which recognize that electric utilities are totally different from telecommunications providers. The regulations promulgated by the Commission should clearly recognize and accommodate the fact that the primary purpose of electric distribution systems is to safely and efficiently deliver vital electric service to ratepayers at the lowest possible cost. To this end, electric utilities should be given significant flexibility over the terms and conditions pursuant to which access to their poles is granted and given adequate leeway to assure that electric customers are not in any manner required to subsidize any telecommunications industry or project, or to jeopardize electric service reliability.¹³

The cable industry stands on the threshold of expanding into other telecommunications markets. Now is the time to shift the industry toward truly competitive and market-driven pricing for siting their facilities. Cable operators now have an increasing array of delivery platforms available to them. It is no longer necessary for cable operators to rely only on cables which must be attached to poles. They may also take advantage of fiber which they bury themselves or a multitude of wireless options. It is important for the Commission to

13. To the extent electric utilities' provide telecommunications services, it is ancillary to their primary business of providing electricity. Intra-company pricing may be treated under accounting principles applicable to other telecommunications providers with pole and conduit facilities to avoid self-dealing. Indeed, this is required pursuant to 47 U.S.C. § 224(g).

adopt pricing guidelines which send the proper economic signals to the marketplace so that attachers and ultimate consumers make decisions which are based on the economic realities of the marketplace rather than false price breaks generated by Commission policies. This is fully consistent with the fact that market-based rates have been the hallmark of the Commission's telecommunications pricing efforts for a number of years.

III. UTILIZATION OF THE COMMISSION'S FORMULA FOR ATTACHMENTS TO POLES AND OPTIONS FOR ACHIEVING THE POLICY GOALS INTENDED IN THE TELECOMMUNICATIONS ACT

Specific pole attachment pricing rules adopted in this proceeding should reflect the maximum fully allocated price of attachment, with an eye toward eventually moving to a forward looking price as a cap for negotiations. Indeed, the statutory pricing formula set forth in § 224(e) for use with telecommunications providers after the year 2001 is much more flexible than that set forth in § 224(d). The Commission is urged in this rule making to move the maximum price under § 224(d) closer toward reflecting the true value of the electric utility assets actually utilized, consistent with the constraints set forth in § 224(d), in order to move toward forward looking costs under § 224(e).¹⁴ From a policy perspective, this would be fully consistent with movement toward a competitive telecommunications market. Furthermore, we recommend that the Commission exercise its rulemaking authority consistent with specific comments and suggestions set forth in the following sections.

14. The conventional view of the cable television market is that after the year 2001 there will be very few pure cable providers subject to § 224(d), which further supports incrementally moving toward a more appropriate price signal for pole attachments in a competitive telecommunications environment.

A. Use of a Pricing Formula

1. Regulations should recognize that formula is only presumptively applicable.

The Commission's order, and the regulations arising therefrom, should explicitly recognize that the formula developed in this proceeding establishes only presumptively just and reasonable rates. By definition, a formula is made up of constants and variables. The pole attachment formula is designed to generally apply to many different utilities. For each attachment scenario, each constant or variable must represent one of a vast array of values that may differ as widely as electric facility architectures, regions of the country, or utility accounting systems. As a result, these may often be an imperfect fit between the constants and variables in the formula, and the costs which they are designed to represent.

This imperfect fit is exacerbated by using specific FERC accounts to provide values used in the formula. FERC accounts are not designed to capture the costs that the Commission seeks to capture in its formula.¹⁵ FERC accounts are designed to facilitate electric utility service pricing to end users and were never intended to serve as a basis for communications services or pole attachment costing. As a result, plugging values from FERC accounts into an FCC formula results in an imperfect portrayal of a utility's costs in providing pole attachment service.

Further, there is too much fluidity among utility company accounting practices for each of the variables in the formula to accurately capture every recoverable cost for every utility. Under the FERC accounting system, different utilities may, with approval from

15. FERC amortizes over X years; the FCC proposes to amortize over Y years.

FERC, book costs differently into the established accounts, and utilities in fact do so. As a result, the mechanical use of FERC accounts would create disparities among electric utilities applying the pole attachment formula.

Other problems with an inflexible formula arise from differences in state regulation and the evolution of cost booking conventions by each utility. Substantial differences in geographic, climatic and demographic details among the various utilities also lead to substantially different cost structures. In addition, utilities' varying needs or abilities to invest in accounting tracking mechanisms that would better (if somewhat imperfectly) support fixed rate pole attachment calculations differ from company to company and state to state, often due to state regulatory needs. While these differences in the booking of costs may not be significant to the electric utility rate making process, in that they remain consistent within each utility from year to year, they do present substantial barriers to the overly mechanical and uniform application of any pole attachment pricing formula across utilities.¹⁶

It should be apparent, then, that each constant and variable in a formula can at best only generally approximate or estimate the cost(s) that it represents when actually applied to derive a rate. Because of the variances in amortization schedules between the FERC accounts and the FCC proposal, the widely varying accounting procedures employed throughout the utility industry, and cost differentials among geographic locations, a formula is highly unlikely to result in the real absolute maximum just and reasonable rate in most

16. Examples of relevant differences include specifically the booking of pole costs. Virginia Power books all street light poles, wooden or otherwise, to FERC Account 373. CP&L books poles containing only a street light to Account 373, and poles containing both street lights and service drops to Account 364. Delmarva separates its pole costs based upon whether the pole height is under or over forty feet (40').

instances. There is simply no guarantee that the formula will result in the approximate maximum just and reasonable rate for every utility.

2. Formula Should Only Set a Presumptive Range of Reasonableness, Not a Definitive Rate.

The rate established by any formula should be recognized as yielding, at a presumptively proper rate under the statute. The Commission must therefore permit utilities to demonstrate that, due to the characteristics of its facilities or some other aspect of its operations, a rate higher than that prescribed by the formula nonetheless complies with the statute. The Commission should explicitly state that utilities are permitted to make such a showing and should explicitly declare that the pole attachment formula yields only the *presumptive* maximum just and reasonable rate and not the *actual* maximum just and reasonable rate.

Commission precedent is replete with acknowledgements that the rates prescribed by formula only approximate -- and do not exactly capture -- maximum just and reasonable rates authorized by statute. When the Commission first implemented the original Pole Attachment Act, the Commission was reluctant to adopt a fixed formula attempting to specify the maximum just and reasonable rate.¹⁷ At that time, the Commission stated:

The substantive guidelines contained herein are intended to provide a common framework within which both CATV operators and utilities may determine the upper (fully allocated cost) limit of the just and reasonable level of applicable pole attachment rates. Instead of attempting to develop a rigid formula to which all

17. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC.2d 59 (1979).

utilities must resolutely adhere, we have examined the elements required by the provisions of the [Pole Attachment] Act, and provided a guideline framework.").¹⁸

The Commission has always been aware that adopting a formula cannot precisely produce the maximum just and reasonable rate but rather can produce only an approximation of a maximum just reasonable rate. In recounting its efforts to implement the 1978 Act, the Commission described its approach as follows:

For the purpose of establishing a just and reasonable rate, the Commission characterized [the costs in the formula] as *approximating* the fully allocated costs, the upper end of the range of rates established by Congress.¹⁹

The Commission further elucidated on this point:

[O]ur goal is to adopt a formula which, using publicly available data, results in a rate which *approaches* the maximum level within the just and reasonable range. * * * *
[This] will facilitate negotiated settlements based on our formula.²⁰

Due to this acknowledged inability of a formula to precisely result in the maximum just and reasonable rate under Section 224, the Commission should explicitly state that its formula represents only the *presumptive* maximum just and reasonable rate utilities may charge for attachments to their poles, and that where other costs can be justified and supported by competent evidence, they may be used to support a rate other than that under a mechanical application of the formula.

18. *Id.* at 67.

19. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4388 (1987) (*citing* Second Report and Order) (emphasis added).

20. *Id.* at 4392 (emphasis added); *see also id.* at 4394 ("Commission policy [has been] to identify only a rate *approaching* the statutory just and reasonable rate . . . based on fully allocated costs") (emphasis added).

3. Strict adherence to a single formula is contrary to the logic of negotiation, tantamount to requiring the use of filed tariffs and beyond the scope of the Act.

As suggested above, it would be shortsighted for the Commission to adhere to the notion that its pole attachment formula results in the actual maximum just and reasonable rate allowed by Section 224(d) rather than an approximation thereof. The Commission should not adopt rules which would prescribe a single maximum just and reasonable rate applicable to all utilities regardless of the intricacies of their systems. If the Commission imposes a formula as the actual maximum just and reasonable rate, no negotiations will take place. Attachers will claim that they cannot be made to pay more than the maximum just and reasonable rate permitted by mechanical application of the formula. Conversely, utilities will adhere to the formula rate as a "worst case scenario" and refuse to negotiate down from that price. Clearly, this result is contrary to the Act.²¹

Adoption of a single formula which is declared to always yield the maximum just and reasonable rate permitted by Section 224 would be tantamount to establishing a tariff for pole attachment rates. Such a prescribed rate would be inconsistent with the expressed intent of Section 224. If the Commission does not permit a showing that, due to accounting differences or other factors, a rate greater than that produced by a generic formula nonetheless comports with the statute, neither party to a pole attachment agreement will have any incentive to agree upon a negotiated rate but will always default to the mechanistic

21. Attaching entities are also likely to argue for "most favored nation" treatment under the guise of non-discriminatory access in demanding the right to the lowest rate negotiated by any other attaching entity unless the Commission makes clear that pricing is not a mechanical process under the 1996 Act.

formula rate. In that event, the formula rate will become the *only* rate, i.e., a *de facto* tariff. This is exactly the *opposite* of what Section 224, which specifically describes a range of permissible rates and assumes a negotiated rate as the norm, contemplates.

Under the statute, the Commission's task is not to set one specific rate, but rather to ensure that negotiated rates, even if not the formula rate, do not fall outside the statutory range. *Alabama Power Co. v. FCC*, 773 F.2d 362, 367 (D.C. Cir. 1985) ("[T]he Commission was not expected to adjust rates that were already within the zone of reasonableness; *its far more limited task is to police the borders.*") (citing S. Rep. No. 95-580, 95th Cong., 1st Sess. 22, *reprinted in* 1978 U.S.C.C.A.N. 109) (emphasis added). The Telecommunications Act of 1996 does not change the Commission's statutory duty. Were the Commission to ascribe maximum just and reasonable rate status to the formula rate, with no right to rebut the presumption, the Commission would exceed its mandate to merely "police the borders." Implementation of a mandatory maximum just and reasonable rate derived from a generic formula requires blind adhesion to an unjustifiably narrow path not contemplated by the statute.

In fact, comparing the pole attachment rates permitted under the Section 224(d) to instances where a tariff is required is quite illuminating. The distinction between the two regulatory tools clearly illustrates that Congress intended that there would not be a single, presumed just and reasonable maximum rate applicable in all instances which would be the equivalent of a filed tariff. Section 224(d) does not contemplate tariffing of pole attachment rates but rather arms-length, case-by-case negotiation with the borders of a broad cost-recovery concept.